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Supreme Court of the United States

October Term, 1975
No. 75-148

FRED J. ZEVCHIK,
Petitioner,

vs.

THE NORFOLK AND WESTERN RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals
Eighth Judicial District of Ohio

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To the Court of Appeals
Eighth Judicial District of Ohio

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Fred J. Zevchik, prays that a Writ of Certiorari issue to review the judgment of the Ohio Court of Appeals, which judgment became final on May 1, 1975, when the Supreme Court of Ohio denied further appellate review.

OPINIONS BELOW

The judgment and opinion of the Ohio Eighth District Court of Appeals, unreported, appears as Appendix B to this petition. The Order of the Ohio Supreme Court overruling petitioner's Motion to Certify the Record, unreported, appears as Appendix A to this petition. No written opinions appeared in the trial court whose judgment entry appears as Appendix C hereto.

JURISDICTION

The Judgment of the Eighth District Court of Appeals of Ohio was entered January 16, 1975. The Supreme Court of Ohio overruled petitioner's Motion To Certify the Record on May 1, 1975. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS INVOLVED

1. In an action for damages under the Federal Employers' Liability Act, where the claimed negligence of the employer is assignment of the employee, over protest, to labor beyond the employee's physical capacity to perform, the fact that a physician employed by the railroad played some role in approving the employee for work does not require proof of malpractice on the part of the physician in order to hold the railroad liable for injury resulting from such work assignments.

2. No party may assign as error the giving or failure to give any instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection. [Ohio Rules of Civil Procedure, Rule 51(A)].

STATUTORY PROVISION INVOLVED

Federal Employers' Liability Act
45 U.S.C.A. §51

The Federal Employers' Liability Act, 45 U.S.C.A. §51 et seq., in relevant part, provides as follows:

> Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . ., or in the case of the death of such employee, to his or her personal representative . . ., for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

STATEMENT OF THE CASE

Plaintiff filed suit under the Federal Employers' Liability Act (hereinafter referred to as FELA), 45 U.S.C. Sec. 51, et seq. Trial was had with the jury returning its verdict against the railroad in the amount of One Hundred Twelve Thousand Five Hundred Dollars ($112,500.00) on August 31, 1973. Defendant thereafter filed its Motion for New Trial which was overruled on February 27, 1974. The railroad filed its Appeal, and on January 16, 1975, the Court of Appeals for the Eighth District remanded the case to the Common Pleas Court for new trial. Notice of Appeal to the Supreme Court of Ohio was filed February 14, 1975. The Supreme Court of Ohio overruled this respondent's Motion to Certify on May 1, 1975.

STATEMENT OF FACTS AND EVIDENCE

Fred Zevchik, who was 52 years of age at the time of trial (Tr. 33), married with three children, the youngest of whom was 11 at the time of trial, started with the N & W in August, 1950 (Tr. 33) as a car cleaner at the coach yard (Tr. 34) and joined the Signal Department a year or two later, as a Helper (Tr. 34). He continued as a Signal Helper until 1967 and was then given the title of Signal Maintainer in charge of what was known as the Cleveland Territory, which extended from West 38th Street to Euclid junction (Tr. 35). He became a Signal Maintainer; he had a helper for a short time, but the helper quit in approximately July, 1968, and was not replaced (Tr. 36), after which Mr. Zevchik performed the work of Maintainer and helper.

There was an automobile accident on November 19, 1968, in which Zevchik was driving the Company truck on the freeway and was struck from the rear by an automobile. He injured his neck quite severely in this accident (Tr. 38, 39). He was treated by Dr. Edmonds, then the Regional Medical Director of the N & W (Medical Director at the time of trial), from November 19 to December 20, at which time he was released to return to work. Zevchik described three days of duty which was light in nature, and then on December 24, 1968, an assignment to do work which he knew was too heavy for him. He asked for help, which request was refused by his supervisor (Tr. 47-48). He was told to either do the work or quit (Tr. 48). Faced with this option, Zevchik began his work, the first step being to take his grinder out of the truck and test it, in the process of doing which task he twisted his low back giving rise to the injury involved in this action.

Dr. Edmonds, Medical Director of the N & W testified that Fred Zevchik, whose entire medical history was before him, had never had any low back complaints prior to the grinder incident on December 24, 1968, and made it clear that any low back complaints that Fred Zevchik had arose from the grinder incident, and not from the automobile accident.

Dr. Hopwood, Dr. Edmonds' successor as a Regional Medical Director of the N & W, who also treated Zevchik at later dates, testified (Tr. 220) that as to low back difficulties, the automobile accident of November 19, 1968 "probably is not related", and (Tr. 222) that the inference of the testimony is that the low back problems started after the grinder incident on December 24, 1968. And Dr. Hopwood further agreed with plaintiff's counsel (Tr. 228) that Zevchik was unable to perform the duties of a Signalman or a Signal Maintainer because of his low back, and that this problem began December 24, 1968.

Dr. Robert Zaas first saw Zevchik in February, 1969 (Tr. 78), at which time his low back symptoms had persisted for something over three months, and urged him strongly not to return to work at that time (Tr. 84). When he did return to work, Dr. Zaas wrote a note in May, 1969, to the Supervisor of the railroad indicating that if lighter work were available, Zevchik could go back to work (Tr. 87-88). In attempting to get light duty for himself, Zevchik talked with Mr. Bell, a Supervisor (Tr. 58), who told him that if he couldn't do the work he must quit the job, since the railroad had no light duty. He requested a helper and was not given one, and he took, in effect, a demotion to Signalman's Helper, but this did not work out (Tr. 60). Zevchik's work for the railroad ended in 1971 under circumstances wherein he was directed by his supervisor (not

by the railroad doctor) to return to work, or be fired, or be listed as a "voluntary quit", and he did try returning to work.

He was immediately assigned heavy work, including climbing poles, and was denied the opportunity to do any other kind of work and so quit working for the railroad (Tr. 70-71-72). Dr. Zaas testified that, in his opinion, it was the assigning of heavy work that caused his back to deteriorate (Tr. 87), ended in disability.

The Court of Appeals, in its Opinion, states that plaintiff's claim is "that the employees and/or agents of defendant were negligent in ordering plaintiff to do heavy work without assistance when his back was in such a condition that heavy work would necessarily cause further injury", and then states:

> "A significant portion of the testimony adduced at trial dealt with the rule played by Dr. Edmonds, the railroad physician, in the decision to return plaintiff to work. Based on the fact that plaintiff introduced no expert testimony as to either the community standards applicable to doctors in similar cases or whether Dr. Edmonds' treatment of plaintiff failed to meet these standards, defendant moved for a directed verdict on the issue of Dr. Edmonds' negligence. The trial court erred in overruling this motion."

This statement by the Court of Appeals is based upon a few chance remarks made in Final Argument. Actually, very little *testimony* at the trial dealt with Dr. Edmonds' role in the *decision to return plaintiff to work*. No objection was made to Final Argument in this regard.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

1. In an action for damages under the Federal Employers' Liability Act, where the claimed negligence of the employer is assignment of the employee, over protest, to labor beyond the employee's physical capacity to perform, the fact that a physician employed by the railroad played some role in approving the employee for work does not require proof of malpractice on the part of the physician in order to hold the railroad liable for injury resulting from such work assignments.

The Court of Appeals relied upon *Davis v. Virginian Ry. Co.*, 361 U.S. 354 (1960), in which the United States Supreme Court held that in a FELA case wherein the First Cause of Action alleged that negligence of a railroad's operating personnel caused an injury, and in a Second Cause of Action alleged that malpractice of a railroad physician further injured him, the malpractice Cause of Action is subject to legal rules relating to medical malpractice.

Here, there is no cause of action alleging malpractice, no claim asserted of malpractice. What is here presented is negligence of the railroad in assigning to Zevchik work beyond his physical capacity to perform.

The Court of Appeals holds that by interjecting its physician into the work assignment area, a railroad can convert an FELA case to a malpractice case, with the attendant higher degree of proof.

This is simply not FELA law. There are many cases in which railroad negligence was held to be present in

permitting an employee to return to work, in each case with permission of a railroad physician, without even a suggestion of malpractice present.

Four years after *Davis, supra*, the Supreme Court of the United States, without even referring to *Davis*, decided one such case.

In *Braswell v. Nickel Plate*, 377 U.S. 405, 84 S. Ct. 1628 (1964), there had been a verdict for plaintiff but the Illinois Appellate Court reversed and entered final judgment for the railroad—43 Ill. App. 2d 21, 192 N.E.2d 592 (1963). The U.S. Supreme Court granted certiorari and summarily reversed.

Braswell had worked as a section hand since 1949, and developed a persistent cough in 1955. Late in 1955, he was hospitalized, carcinoma diagnosed, and a portion of his lung removed. An infection later developed in his chest cavity. Not until October, 1956, was he released by his physician and told he was able to return to work.

However, the railroad's examining physician refused to qualify him for work. He did see an assistant medical director in Cleveland who also refused to qualify him but suggested he obtain a report from his own physician to the medical director. Thereafter, a local examining physician qualified him and he returned to work June 13, 1957.

He then worked without complaint until July 3, 1957, when he suddenly collapsed.

None of the doctors called by the plaintiff expressed an opinion as to whether there might have been any relationship between the work he did as a cause of the unconsciousness and fall to the ground and his resulting disability. Most definitely, none of the doctors expressed any opinion that any railroad doctor had failed to meet

the applicable standard of medical care of the community in his treatment of Braswell.

Yet the Supreme Court summarily reversed the Illinois Court and directed that judgment be entered on the original jury verdict. As to the merits, the Supreme Court was unanimous. *Rogers, infra,* was cited. *Davis* was not cited.

Knobel v. Pennsylvania R. Co., 192 F. Supp. 771, *aff'd* 296 F.2d 737 (3rd Cir. 1962), involved a claim under the FELA for wrongful death of a clerk who died as a result of a fall on a marble tile floor.

The decedent had started working with the Pennsy in 1941. In December, 1953, he suffered an epileptic seizure at home. Later, a company doctor examined him and refused to qualify him for work. In August, 1954, he was again held not qualified. In December, 1954, an ophthalmologist recommended a return to work, but with duties limited to those requiring only limited visual acuity.

On this basis, he was qualified and began restricted employment January 3, 1955. He was found dying on May 10, 1955.

The Third Circuit held that the jury with reason could have found the defendant company was negligent in certifying him back to work and assigning him duties that required him to traverse hard-surfaced floors. *Davis* was not mentioned.

In *Dunn v. Conemaugh & Black Lick Railroad,* 267 F.2d 571, 3rd Cir., 1959, the Court discussed the ramifications of the employment by a railroad of a physician, and commented that the relationship of employment involves the right of the employer to set the standards of performance by that employee, raise those standards, or reject the results of that work.

The same is true here. Zevchik's testimony makes it clear that it is his supervisor who assigns him to his work duties, after the doctor has certified him as able to return to work. Thus the reason for the allegations in the Complaint that "the defendant" returned him to full duty before he had fully recovered.

Most persuasive, is *Waller v. Southern Pacific Company*, 57 Cal. Rptr. 353, 424 P.2d 937 (Cal., 1967). In *Waller*, the Supreme Court of California held that in an FELA case, there was sufficient evidence to satisfy the test of *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S. Ct. 443 (1957), wherein it appeared that a man suffering severe coronary from a severe cardiovascular condition was certified as fit to return to work in 1959 by railroad physicians, suffered a worsening of his condition so that those same doctors, in 1961, refused to certify him as fit to work, the suit being based upon the plaintiff's claim that the railroad was negligent in permitting him to return to work when it knew or should have known (through the medical records) that return to work in a tense atmosphere would probably aggravate his condition. Nowhere in the Opinion is it suggested that the railroad is not bound by "its" knowledge of the plaintiff's condition, even though that knowledge be derived through its medical personnel. Nowhere is it suggested that the plaintiff must somehow prove malpractice on the part of the railroad doctors in order to bind the railroad. This, and the other cases cited above, merely emphasize the ingenuity of the defendant in thinking that the *Davis* case applies to any situation other than one in which malpractice is specifically charged.

2. No party may assign as error the giving or failure to give any instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection. [Ohio Rules of Civil Procedure, Rule 51(A)]

The Court of Appeals, in its Opinion stated:

> Civil Rule 51 (A) states in pertinent part, "No party may assign as error the giving or the failure to give any instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection."

At the close of plaintiff's case, the defense moved as follows (Tr. 146):

> Your Honor, at this time, the defense would move for a direction of verdict on that specification of negligence that argues that the railroad physician was negligent in sending Mr. Zevchik to work before he was prepared to go.

As authority for this proposition, defense counsel cited 42 OHIO JUR. 2d, p. 22, §158, which deals with when expert testimony is necessary in a medical malpractice case. *Davis v. Virginian Ry. Co.*, 361 U.S. 354 (1960) was *not* cited to the Court.

It will be noted that defendant, in its Assignment of Error and Brief, quotes no specification of negligence upon which a direction of verdict could be based. The Motion at that time was taken under advisement by the Court.

At the close of all the evidence, during a discussion in chambers of the Court's proposed instructions to the jury, the defense counsel renewed his motion (Tr. 273),

> I would once again renew my Motion for a Direction of Verdict on the specification of negligence that touches on the doctor being in error in sending the man back to work and continuing to send him back to work on the grounds that there has not been sufficient evidence to allow the jury to infer that the doctor was negligent.

In the following discussion (Tr. 273), defense counsel stated,

> I am not saying that this is a medical malpractice case.

Again, *Davis* was not cited. The Motion was denied.

It is to be noted that *there is no specification of negligence* in the Complaint dealing with medical malpractice. *There is no separate Cause of Action* in the Complaint dealing with medical malpractice. There is *no record of any objection* on the part of defense counsel *to plaintiff's argument* on the points raised in the Court of Appeals dealing with the alleged claim that plaintiff was asserting a malpractice case against Dr. Edmonds. There is no request by defense counsel for the Court to use certain language in its charge informing the jury that they are not to consider malpractice on the part of Dr. Edmonds.

Most important, there is *nothing* in the instructions of the Court concerning negligence on the part of the doctor being a ground for recovery by the plaintiff against the defendant, nor is there any exception taken by the defense counsel to the Court's omission of any instructions on this point.

Defendant asserts that *Davis v. Virginian Ry. Co.*, (*supra*) disposes of this case. Plaintiff claims that *Davis* is *limited* to cases where malpractice is asserted.

In *Davis*, the Complaint set forth two counts: First, that the negligence of the railroad caused his broken leg; and Second, that the injury was aggravated by the malpractice of the railroad's employee-doctor. The lower court dismissed the case as to both counts. The Supreme Court held that the case must go to the jury on the first count, but that the evidence was insufficient as to the second count.

The result, of course, would be a trial asserting negligence of the railroad in causing him to break his leg. The sequelae of that broken leg would be of no significance whatever, since whatever happened to his leg as a result of the initial break would be part of that case.

So here, as well. The Complaint alleges that Fred Zevchik was required to resume heavy duty before he had fully recovered.

The defendant asserts that if this were true, the fault would be that of Dr. Edmonds, thus constituting malpractice. Plaintiff disagrees. Dr. Edmonds qualified him for work. Other personnel of the railroad assigned his duties. The jury could most certainly conclude from the evidence that Dr. Edmonds, supplied by his employers with job descriptions and with information concerning union contract requirements, felt that Zevchik's duties were mostly supervisory, not requiring heavy work.

If this information was not correct, again it is railroad officials other than Dr. Edmonds who were negligent.

The fact is that "the railroad" forced him to return to heavy duty, but was free at all times to assign Zevchik duties within his physical capacities as he asserted them to be. Dr. Edmonds did not assign Zevchik his duties. He stated only in his opinion Zevchik was qualified for work.

CONCLUSION

There are many railroad employees in Ohio. They are not eligible, as are other workmen, for Workmen's Compensation Benefits, but rather their sole remedy for injuries at work is the Federal Employers' Liability Act (hereafter FELA).

The FELA, unlike the Workmen's Compensation Act, requires that the injured workman prove that employer negligence played a part in causing his injuries.

In the fact situation here presented, there can be no question that Zevchik would have been covered by Workmen's Compensation had he not been a railroad employee, regardless of what doctor treated him.

Equally, since the jury found that Zevchik suffered his low back injury on December 24 while at work and that negligence of his supervisor played a part in causing that injury, the railroad would remain liable for complications of that injury even if due to malpractice by the railroad doctor.

Yet here the Court of Appeals has held that if a railroad doctor approves an injured man for work, the railroad is exonerated from liability unless plaintiff proves malpractice on the part of the doctor.

Further, the Court of Appeals entirely ignores its prior decision in *Urdang v. Drs. Mahrer, etc.*, 81 Ohio L. Abs. 23, 158 N.E.2d 902 (Cuy. Co. App., 1959) in which headnote 1 states:

> Ordinarily, expert evidence is essential to support action for malpractice; but expert evidence was not necessary to prove that defendant doctors had been

> negligent in failing to provide assistance for 76-year old patient who fell over step while leaving bathroom, whence she had been escorted for purpose of relieving her intestines of foreign substance after being given barium enema at defendants' offices; and lay testimony adduced, in action for injuries sustained by such patient, was sufficient to take to jury issue as to whether defendants had been negligent in that regard.

We read *Urdang* plainly to belie defendant's bold and absolute assertion that expert testimony is needed. *Urdang* involved a physician as a defendant and the physician's negligence which the Court there held was provable by lay testimony derived from medical treatment—the barium enema. Certainly then there may well be circumstances where it is not necessary to produce expert testimony to establish negligence of a physician where such negligence is unrelated to medical treatment.

And we submit that the case at bar is a good example of this.

Nearly every employee of a railroad in the United States is affected by the decision of the Court of Appeals below.

As to non-railroad industrial workers, the Appeals Court has previously held that no separate claim may be made beyond Workmen's Compensation for malpractice of the company doctor. *Proctor v. Ford Motor Co.*, 36 Ohio St. 2d 3 (1973). Such results of an injury are included in the original claim for injury.

So also here, and in *Davis* on re-trial, and in *Waller*, *Braswell*, *Knobel*, and *Dunn*. Malpractice need not obscure the basic rule that in an FELA case,

The test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. (*Rogers v. Missouri Pacific Railroad Co.*, (1957), 352 U.S. 500, 506-507, 77 S. Ct. 443, 448-449, 1 L. Ed. 2d 493)

Respectfully submitted,

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APPENDIX A

Entry of the Supreme Court of Ohio Denying Leave to Appeal

(May 1, 1975)

No. 75-235

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

FRED J. ZEVCHIK,
Appellant,

vs.

NORFOLK & WESTERN RAILWAY CO.,
Appellee.

MOTION FOR AN ORDER DIRECTING
THE COURT OF APPEALS
FOR CUYAHOGA COUNTY
TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

APPENDIX B

Opinion and Journal Entry of the Cuyahoga County Court of Appeals

(January 16, 1975)

No. 33485

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT, COUNTY OF CUYAHOGA

FRED J. ZEVCHIK,
Appellee,

vs.

THE NORFOLK AND WESTERN RAILWAY COMPANY,
Appellant.

JOURNAL ENTRY

This cause came on to be heard upon the pleadings and the transcript of the evidence and record in the Common Pleas Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Common Pleas Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

Plaintiff appellee Fred Zevchik filed a complaint under the Federal Employer's Liability Act (hereinafter F.E.L.A.), 45 U.S.C., § 51, *et seq.* The complaint alleged that as a direct result of the negligent acts of the defen-

dant, The Norfolk and Western Railway Company, plaintiff suffered painful, incapacitating injuries to his lower back.

The case went to trial on August 21, 1973. Various testimony was elicited at trial, tending to show that several different incidents, some unrelated to plaintiff's claim against defendant, may have contributed to plaintiff's lower back condition.

In chronological order, the testimony revealed the following four incidents. First, on November 19, 1968, plaintiff was "rear-ended" while driving a truck under circumstances unrelated to the present claim. Plaintiff went to Dr. Edmonds, the Regional Medical Director for defendant, and was treated for neck injuries received in the rear-end collision. Dr. Edmonds permitted plaintiff to return to work on December 20, 1968. Second, on December 24, 1968, during the course of his work as a signal maintainer, plaintiff attempted to remove a forty pound grinder from a truck. Plaintiff testified that he strained his lower back while lifting the grinder. Plaintiff again went to Dr. Edmonds who kept him off work until approximately January 20, 1969. Plaintiff continued to complain about his back and, after consulting his own physician, Dr. Zaas, plaintiff missed work for intermittent periods throughout 1969. Third, in September of 1969, plaintiff slipped and fell at work, further aggravating his back injury. Fourth, on December 3, 1971, plaintiff hit a brick culvert while driving 35 miles per hour in his own car.

After hearing this testimony, the jury returned a verdict for plaintiff in the amount of $112,500. Defendant's motion for a new trial was denied. Whereupon, defendant appealed, assigning three errors set out and ruled upon below.

Assignment of error No. 1:

> "The trial court erred in refusing to direct a verdict in favor of the railroad on plaintiff's claim that the railroad physician was negligent."

This assignment of error is well taken.

The gravamen of plaintiff's claim is that the employees and/or agents of defendant were negligent in ordering plaintiff to do heavy work without assistance when his back was in such a condition that heavy work would necessarily cause further injury.

A significant portion of the testimony adduced at trial dealt with the role played by Dr. Edmonds, the railroad physician, in the decision to return plaintiff to work. Based on the fact that plaintiff introduced no expert testimony as to either the community standards applicable to doctors in similar cases or whether Dr. Edmonds' treatment of plaintiff failed to meet these standards, defendant moved for a directed verdict on the issue of Dr. Edmonds' negligence. The trial court erred in overruling this motion.

In an action brought under the F.E.L.A., *Davis v. Virginian Ry. Co.* (1960), 361 U.S. 354, the United States Supreme Court held that proof of malpractice requires two evidentiary steps: (1) evidence of the recognized community standards in the particular type of case; (2) a showing that the physician in question departed from this standard.

Plaintiff argues that this is not a malpractice case, but an F.E.L.A. case, and that *Davis* therefore does not apply. This argument is not well taken. *Davis* was also an F.E.L.A. case in which the plaintiff attempted to hold the defendant railroad responsible for the negligence of a rail-

road physician. The Supreme Court held that the issue of the physician's negligence was properly taken from the jury because the evidence was insufficient to support a malpractice claim.

While plaintiff's claim in the case at bar did not contain a separate count based on malpractice, the issue of Dr. Edmonds' negligence was raised by both the evidence produced at trial and the general charge in plaintiff's complaint that employees and/or agents of defendant were negligent. *Davis* requires that the issue of Dr. Edmonds' negligence should have been taken from the jury because plaintiff offered insufficient proof of malpractice.

Assignment of error No. 2:

> "The verdict was prompted by prejudicial comments about plaintiff's lowly station in life which were objected to and overruled."

This assignment of error is not well taken and is overruled.

Defense counsel made two objections to comments made by plaintiff's counsel during closing argument. Both objections followed references by plaintiff's counsel to the fact that plaintiff had an eleven-year-old daughter at home. A reading of the record reveals that these comments could have been offered to explain why plaintiff repeatedly returned to work even though his injuries were as severe as he claimed at trial. As such, the comments were not improper. Further, considering the broad discretion granted trial courts in controlling closing argument, and the relatively innocuous nature of the comments, we find that the trial court's rulings do not constitute an abuse of discretion and are, therefore, not reversible error.

Assignment of error No. 3:

> "The trial court erred in refusing to instruct the jury that plaintiff bears the burden of excluding the effectiveness of causes of his disability for which the railroad was admittedly not responsible."

This assignment of error is not well taken and is overruled.

Defense counsel made an objection to the jury charge, stating: "I would note an exception to the court's refusal to charge that causes not proved. . . ." At this point, the trial court interrupted to say, "In connection with the special charge?" Defense counsel replied, "In connection with the special charge. This is all I have." (R. 346).

Civil Rule 51(A) states in pertinent part: "No party may assign as error the giving or the failure to give any instruction unless he objects thereto before the jury retires to consider its verdict, *stating distinctly the matter to which he objects and the grounds for his objection.*" (Emphasis added.) The record in this case does not contain a distinct statement of the grounds for defendant's objection. In his appellate brief appellant states that he wanted the trial court to charge the jury on the rule of law taken from *Gedra v. Dallmer* (1950), 153 Ohio St. 258.

The second syllabus of *Gedra* states that:

> "2. In a negligence action, it is not sufficient for plaintiff to prove that the negligence of defendant might have caused an injury to plaintiff but, if the injury complained of might well have resulted from any one of several causes, it is incumbent upon plaintiff to produce evidence which will exclude the effectiveness of those causes for which defendant is not legally responsible."

However, *Gedra* deals with a situation wherein plaintiff received *one* injury, a rat bite, while attending defendant's theater. The presence of the rats in defendant's theater may have been caused by defendant's negligent maintenance of the theater or by any one of several other causes. *Gedra* does not deal with a situation such as that contained in the case at bar, where plaintiff received several aggravations of the same injury.

A party whose request for jury instructions fails to embody the correct law governing an issue, and who otherwise fails to comply with Civil Rule 51(A), waives his right to question the trial court's charge upon appeal. *Presley v. Norwood* (1973), 36 Ohio St. 2d 29.

Further, the trial court did charge that ". . . you may only include an element of damages if it is caused in whole or in part by any negligence of the defendant established by a preponderance of the evidence." (R. 342). This is a proper statement of F.E.L.A. law.

For the foregoing reasons, assignment of error number three is overruled, without prejudice to the right of defendant upon remand to distinctly request a proper charge dealing with the aggravation of existing injuries.

Because assignment of error number one is well taken, the cause is reversed and remanded for a new trial.

No other error appearing in the record, this cause is remanded to the Common Pleas Court for new trial.

It is therefore considered that said appellant recover of said appellee its costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

JACKSON, P.J., CORRIGAN, J., COOK, J., concur

(Cook, J., of the 11th Appellate District, sitting by assignment.)

/s/ LEO A. JACKSON
Presiding Judge

APPENDIX C

Judgment Entry of the Court of Common Pleas Of Cuyahoga County

(February 15, 1974)

Motion by the deft. Norfolk & Western Railway for a new trial is overruled.

/s/ PRYATEL
Judge

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Supreme Court of the United States

October Term, 1975

No. 75-148

FRED J. ZEVCHIK,
Petitioner,

vs.

THE NORFOLK AND WESTERN RAILWAY COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS EIGHTH JUDICIAL DISTRICT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS EIGHTH JUDICIAL DISTRICT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

POSTURE OF THE CASE

Petitioner, Fred Zevchik, wrested a $112,500.00 verdict against Respondent, The Norfolk and Western Railway Company at the hands of an Ohio state court jury. The Court of Appeals of Ohio of the Eighth Judicial District reversed and remanded the case for new trial. The Ohio Supreme Court refused to grant Petitioner's Motion to Certify.

THE ISSUE

Petitioner proceeded below on two theories. First, he contended that the railroad physician, who was treating Petitioner, was negligent in sending him back to work before his back had fully healed. The second issue presented to the jury concerned a charge that after Petitioner had returned to work, the railroad forced him to work alone after refusing to respond favorably to Petitioner's request for assistance.

The Court of Appeals reversed on authority of *Davis v. Virginian Railway Co.*, 361 U.S. 354 (1960) on the issue of the physician's negligence. A new trial was ordered on the remaining issue.

THE FACTS

Petitioner was involved in a traffic accident when the company truck he was driving was struck from the rear. He claimed injury in that incident, although no claim was made against the railroad. This accident took place on November 19, 1968. Thereafter, Petitioner was treated by Dr. Edmonds, the railroad doctor. On December 20, 1968, the doctor cleared Petitioner for a return to work.

On December 24, 1968, while lifting a grinder from a truck during the course of his duties as an employee of the railroad, Fred Zevchik claimed he re-injured his back. Petitioner argued below that prior to lifting the grinder from the truck, he called his supervisor in order to obtain a helper. He contended the request for aid was refused.

Petitioner once again returned to the railroad doctor for treatment. Again on January 20, 1969, the doctor sent Mr. Zevchik back to work, this time over Petitioner's protests that he was not yet ready. The additional work, it is claimed, further exacerbated the back condition.

Finally, Petitioner sought out his own physician. After returning several times for very short tours, Petitioner worked no more.

THE TRIAL

The Complaint, in a single cause of action, alleged negligence. But as the trial developed, it became apparent that Petitioner was proceeding on two issues. First, it was contended that Dr. Edmonds, the railroad physician, was negligent in his care and treatment of Petitioner. Second, it was argued that Respondent was negligent in either requiring Petitioner to perform work he was not suited to do or in failing to assist him when assistance was requested.

At the close of Petitioner's case-in-chief Respondent moved for a directed verdict on the issue of Dr. Edmonds' negligence. The motion was overruled. It was renewed at the close of all of the evidence and, again, overruled.

Petitioner, in the Court of Appeals, in the Ohio Supreme Court and now here argues that he never charged Dr. Edmonds with negligence. He characterizes his closing argument charges as "a few chance remarks." Observe then as Petitioner's counsel explains what he conceives as the "issues" and listen to the charges made against Dr. Edmonds. When finished, ask yourself if this Petitioner was attempting to convince the jury that Petitioner

was entitled to a verdict in his favor because the railroad doctor was negligent in his treatment.

Plaintiff tells the jury—

> So there are two factors here: one sending him back to work before he had completely recovered that is an agent of the railroad that was doing that. Of course don't forget that his supervisor could also give him light duty and refused to do so. That is *another* agent of the railroad. And the other is just plain refusing to give him help.... (Tr. 296-97).

The first agent referred to in the quoted material is Dr. Edmonds. Observe then as plaintiff argues his case to the jury.

> [H]e didn't work after that for three months. He couldn't take it. That is what he told you. He couldn't take it. *Dr. Edmonds wouldn't pay any attention to him.*... (Tr. 282). (Emphasis supplied throughout.)

> Before he goes back to work, he has to be cleared by the company doctor. So he saw Dr. Edmonds who cleared him for full duty, not light duty. *Now I say that was wrong of Dr. Edmonds.* (Tr. 283).

> I don't say he is a bad doctor, but I say he didn't believe Fred Zevchik, and I think he made it clear that he didn't believe Fred Zevchik. (Tr. 283).

> Well, *frankly I don't believe Dr. Edmonds* and I will tell you two things why: and *I think they are pretty doggone glaring myself.* (Tr. 283).

> Now, why in the world did he [Dr. Edmonds] do that if [plaintiff] was in such fine shape? Dr. Edmonds didn't tell us about that. Dr. Edmonds was full of subjective complaints, exaggerated symptoms

> and so on and so forth. And he kept talking that way. I thought he would never stop talking about how Fred seemed to be exaggerating, and it sounded to me like he said that he was faking, although he denies [it]. (Tr. 284-85).
>
> Dr. Edmonds kept insisting that he was ready to do full duty, full employment, all the heavy work, too. And he kept sending him back and kept sending him back to work that way rather than let him do the lighter duties available or that were useful things that would not interfere with the operation of the railroad. (Tr. 285).
>
> The damage had been done, as Dr. Zaas says, "Every new insult to those tissues; every new injury contributes to the overall picture." *Every time he is sent back to heavy work, again without a chance to recover completely, before he starts the heavy work, then more damage is done.* . . . (Tr. 287-88).

Obviously, it is readily apparent that plaintiff is pointing the accusing finger at Dr. Edmonds and arguing that the doctor's treatment was negligence. But, again—

> The potential was there because of the automobile accident. It had given him one little siege during that month off. Edmonds didn't pay any attention to it. Edmonds doesn't even remember him telling him about it. Edmonds says, "Nothing to do with the low back, the accident." (Tr. 295).
>
> *NOW, IT IS NEGLIGENT FOR DR. EDMONDS TO SEND HIM BACK TO WORK*? (Tr. 296).
>
> Well, it would be if he knew the condition of his low back. Edmonds said he didn't know the condition of his low back. *Well, it is negligent for him*

not to find that, but he shouldn't have been back at work at that time, it turns out. (Tr. 296).

IT CERTAINLY WAS NEGLIGENT OF DR. EDMONDS TO SEND HIM BACK TO FULL DUTY IN MAY OF THAT YEAR WHEN DR. ZAAS IS TREATING. (Tr. 296).

IT WAS CERTAINLY NEGLIGENT IN THAT FALL OF THAT NOVEMBER TO SEND HIM BACK TO FULL DUTY, AND FRED WAS TELLING HIM, "THAT I CAN'T DO IT." (Tr. 296).

Petitioner introduced no evidence on the recognized standard of medical care and treatment and no evidence that Dr. Edmonds departed from any recognized standards of care. It was for this reason Respondent sought to remove this as an issue in the case.

ARGUMENT

1. In an action for damages in a case arising under the Federal Employers' Liability Act, no jury question is present on an issue of a servant-physician's negligence in the dispensation of medical care and treatment to a fellow employee unless evidence is introduced concerning the recognized standard of medical care and treatment to be rendered under the same or similar circumstances and evidence is introduced that the physician's care and treatment fell short of the standard except in those cases where the act of negligence complained of is capable of being judged by the ordinary lay jury, without the aid of expert testimony.

As argued here and throughout the appellate courts, there is little relationship between the case Petitioner presents here and the one tried to the jury. It is argued that the railroad has attempted to interject its physician into the work assignment area and thereby convert a garden variety F.E.L.A. case into a more difficult malpractice case.

Petitioner's theory below, and the one plainly argued to the jury, was that Dr. Edmonds was negligent as a physician. Now he claims that Respondent and the Court of Appeals misunderstood. The argument runs that Dr. Edmonds wasn't really negligent as a doctor. He played only a minor role in sending Petitioner back to a job the doctor thbught was entirely compatible with the Petitioner's condition. Petitioner says that the railroad was

negligent in not giving him the work the doctor thought was available or negligent in failing to tell the doctor such work was unavailable.

The Court of Appeals gave this *new* position the short shrift it deserves. There is no mistaking *the fact* that the railroad moved for a directed verdict on this issue injected by Petitioner of physician negligence. There is no mistaking *the fact* that Petitioner vigorously opposed the motion. There is no mistaking *the fact* that Petitioner with equal vigor argued physician negligence to the jury. If indeed physician negligence was a non-issue, why did Petitioner object to the railroad's motion?

A review of each case cited by Petitioner reveals that in not one was the railroad physician himself accused of negligence. Each case involved the question of how the railroad responded to a physician's judgment. This case, like *Davis,* involves the physician's treatment and advice as one basis of the railroad's claimed liability.

Davis v. Virginian Railway Co., 361 U.S. 354 (1960) is practically four square with this case. In *Davis,* Petitioner complained that the railroad physician sent him back to work too soon following a leg injury. The second issue involved a charge that a shifting of cars at an accelerated pace in addition to inadequate assistance caused injury.

Davis held:

> Proof of malpractice, in effect, requires two evidentiary steps: evidence as to the recognized standard of the medical community in the particular kind of case, and a showing that the physician in question negligently departed from this standard in his treatment of plaintiff. *Id.* at 357.

Petitioner Zevchik attempted neither the proof of the standard nor a showing that Dr. Edmonds' treatment fell short of the mark.

The only difference between *Davis* and *Zevchik* is that Davis spelled out his claims in two separate causes of action whereas Zevchik spells his claim out in one cause of action. But it is hornbook law that the issues that develop at trial find their genesis not in the Complaint but in the evidence. Issues set forth in the Complaint that are not the subject of proof wither for lack of substance. Evidence giving rise to an issue demand the attention of the trial court and the jury even if not spelled out with particularity in the Complaint.[1] Petitioner's arguments here and in the two appellate courts through which this case has passed that no attack was made on the doctor are simply not true.

Turning then to the cases relied on by Petitioner we come first to *Braswell v. Nickel Plate*, 377 U.S. 405 (1964). *Braswell* does not aid us here as plaintiff in that case never contended that the railroad doctor was negligent. His Complaint was that his work was too strenuous. This is precisely what Petitioner claimed in his second thrust—the work was too hard without assistance. But Respondent never contended it was entitled to a directed verdict on this issue.

Knobel v. Pennsylvania R. Co., 192 F. Supp. 771, *aff'd*, 296 F.2d 737 (3rd Cir. 1962) is also relied on. *Knobel* had nothing whatever to do with any claim of negligence by a railroad physician. It involved an employee with poor eyesight. The district court held there was sufficient evidence for the jury to find the railroad negligent in

---

1. Assuming of course that a wholly new unrelated cause of action is not introduced for the first time during the trial.

assigning a visually handicapped man to work at a job that exposed him to injury by tripping. The case really involved a claim of negligence on the part of the railroad for not following the advice of its own physician.

Dunn v. Conemaugh & Black Lick R., 267 F.2d 571 (3rd Cir. 1959) is a pre-*Davis* case. But again no claim of physician negligence was raised.

Petitioner's reliance on *Waller v. Southern Pac. Co.*, 424 P.2d 937 (Cal. 1967) is likewise misplaced. The evidence disclosed that the railroad concealed plaintiff's true illness from him and suffered him to work in a tense job that hastened his illness to the point he could no longer work. One of the railroad's doctors had even written to plaintiff's wife stating that plaintiff's tense position would aggravate his condition.

This case is best considered and Petitioner's claims most fairly judged when it is recalled that Petitioner was the one who elected to bifurcate his attack on the railroad. No one forced Petitioner to claim the physician was negligent. But since Petitioner did, the railroad sought to remove the issue from the case because of a failure of proof. A construct would be helpful. Let us suppose plaintiff is injured when defendant strikes plaintiff's car in the rear. Plaintiff claims negligence in a single cause of action in his Complaint. At trial he not only seeks to prove the defendant violated a statute in failing to stop or control his car but, in addition accuses the defendant of failing to have his headlights on during the night season. The defendant moves for directed verdict on the headlight specification arguing that plaintiff failed to prove it was dark. The motion is overruled. Defendant appeals an adverse verdict and the Court of Appeals agrees the trial court erred on the headlight issue. The case is re-

versed and remanded for new trial. At this point in the instant case we are in the same position.

Petitioner, at his peril, elected to nail up as many hooks as he could upon which the jury could hang the hat of a plaintiff's verdict. He now complains because the Court of Appeals took one hook away because of a fatal deficiency in the proof.

2. Where a party's motion for directed verdict on or dismissal of an issue is overruled, an objection to the court's charge on that issue is neither necessary nor warranted for the purpose of preserving the claimed error for appeal.

Petitoner's second argument is a catchall for three separate arguments all of which amount to a claim that if error did intervene in the trial court's refusal to direct a verdict, the railroad "waived" the error.

First, Petitioner claims (p. 11) that because *Davis, supra,* was not cited to the trial court the objection was waived. This is nonsense. True *Davis, supra,* was not cited because counsel was unaware of it until the Motion for New Trial was briefed. But the Transcript adequately demonstrates in unequivocal language the precise basis for the Motion for Directed Verdict and appropriate Ohio authority for the propositioned urged.

The second claim is that counsel for the railroad deceived the trial court by arguing, "I am not saying this is a medical malpractice case." (Pet. Brief p. 12). This type of argument lifting a statement out of context is reprehensible. An explanation is in order. After the railroad made its motion, Petitioner argued that he was not accusing the doctor of malpractice. He claimed that the

issue involving the doctor was pure negligence. This "rose by another name" seemed to be carrying the day. It was then the railroad made the statement that is quoted above. But there was more. The argument succeeded in the trial court but was swiftly rejected by the Court of Appeals. Counsel for the railroad in arguing the motion for direction to the trial court attempted to dissuade the court from following plaintiff's argument—

> No, your honor. I am not saying that that is a medical malpractice case. What I am saying is that the proof required here against the defendant, insofar as the doctor's negligence is concerned, is identical to the proof that would be required in a medical malpractice case and it is on that basis that I make the motion for direction of . . . (Tr. 273).

Petitioner's attempt to mislead this Court into believing that the railroad did not preserve the error below by quoting out of context should receive the attention it deserves.

Third, Petitioner claims that because the railroad did not object to his closing arument concerning Dr. Edmonds' negligence and did not ask the trial court to charge the jury they could not return a verdict against the railroad based on the physician's conduct, the issue was waived. These arguments did not impress the Court of Appeals one iota and deserve no attention here.

There is no requirement for the preservation of error that counsel jump up and down like a jack-in-the-box to repeat objections and re-raise arguments once told the trial court disagrees. Twice the railroad moved for a directed verdict on the issue. Twice the trial court overruled the motion. Now Petitioner tells this Court the error was waived because the railroad did not object to

Petitioner's closing argument about the physician's negligence. And the Court is told the railroad waived the error because it did not demand the trial court cure the error in the charge. This Court has set the standard for a lawyer's conduct and what is expected of counsel once he is told the trial court disagrees—

> [I]f the ruling was adverse, it is not counsel's right to resist it or to insult the judge—his right is only respectfully to preserve his point for appeal. *Sacher v. United States,* 343 U.S. 1, 9 (1951).

The trial court obviously was of a view that Petitioner was entitled to present to the jury the issue of the railroad physician's negligence. Having twice overruled the railroad's motion, repeated objection and motions directed to the same issue would have been superfluous and perhaps approached contempt.

Petitioner's final parting salvo, couched as it is in the Conclusion (p. 14) is a direct misstatement of the Ohio two-issue rule. Petitioner claims that the Court of Appeals erred "since the jury found that Zevchik suffered his low back injury on December 24 while at work and that negligence of his supervisor played a part in causing that injury." The statement is made that even if malpractice was a cause of the injury, the verdict could be supported on the other issue.

This was a general verdict. Petitioner did not elect to test the verdict with interrogatories. No one knows whether the jury based its verdict on the issue of Dr. Edmonds' claimed negligence or on the issue of the railroad supervisor's refusal to send Petitioner the requested aid. This case was tried in state court. Ohio follows the two-issue rule. The rule, briefly, is that where a jury verdict

can be supported on two or more theories, the fact that one issue was the subject of an inaccurate charge will not warrant reversal if an issue that would support the verdict was the object of a proper charge.

The rule does not apply where an issue should not have been submitted in the first place. See, *gen.* 4 O. JUR. 2d, *Appellate Rev.*, §831. It is the railroad's contention, of course, that the issue of Dr. Edmonds' alleged negligence should never have been submitted to the jury.

The Court of Appeals did not hold as Petitioner claims that a railroad is exonerated from liability if a plaintiff fails to prove malpractice where a railroad doctor merely approves a man for work. The Court of Appeals did hold, as did *Davis,* that if medical judgment is involved in the decision of whether a man is sufficiently recovered that conduct must be measured by the standards applicable to medical men in the same or similar circumstances.

Insofar as *Urdang v. Mahrer,* 81 Ohio L. Abs. 23, 158 N.E.2d 902 (Ct. of App. 1959) is concerned, the Court of Appeals did not part company with its earlier decision. *Urdang* said that expert testimony was unnecessary in a case involving an elderly woman who fell in a bathroom after being given a barium enema. The court said the jury can decide whether it was negligence to send a seventy-six year old woman to the bathroom without aid after being subjected to the treatment described. Here, medical treatment and judgment was uniquely bound up with Dr. Edmond's repeated advice to Mr. Zevchik to return to work.

The result reached below does not sound the death knell for the F.E.L.A. or railroad employees. *Davis* was applied. It is the law.

CONCLUSION

Petitioner serves up *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500 (1957) as though the mere mention of the name would cause a trial or appellate judge to recoil in fear at the prospect of examining the evidence or the law upon which a jury based its verdict. *Rogers* does not stand for the proposition that due process of law shall be dispensed with in F.E.L.A. cases. It does not hold that each and every issue raised by an injured employee is entitled perforce to jury consideration.

The result reached below by the Court of Appeals is consonant with *Rogers*. All *Rogers* says is that the jury must be entitled to consider "whether the *proofs* justify with reason . . . negligence." *Id.* at 506. But it is and has ever been thus that the court decides what is and is not "the proofs." *Davis*, upon which we rely, is not a *pro tanto* reversal of *Rogers* which preceded *Davis* by three years. *Davis* has nothing to do with the principles of *Rogers*.

The *Davis* rule is salutary and hornbook law in every jurisdiction. The principle is simple—laymen are not usually in a position to judge whether one who practices the art of healing has erred, not without assistance from an expert. This Court has announced that if Petitioner seeks to blame the physician for his treatment he must establish the standard of care and measure the physician's treatment against that standard. Whether Petitioner had done that which *Davis* requires of him is a judicial decision.

The scant fifteen years that have passed since *Davis* has seen no change in the law of the nature of the proof required in a physician negligence case. No social, economic or jurisprudential reason exists that suggests *Davis* ought to be re-examined.

If the Congress felt aggrieved by *Davis* it surely has had adequate opportunity to respond. It is not the duty or prerogative of this Court to judicially convert the F.E.L.A. into a Workmen's Compensation Act.

Davis says it all insofar as this case is concerned. The point need not be restated. The Court of Appeals correctly applied *Davis*. Petitioner will have his day in court when this case is retried.

The application for Writ of Certiorari should be denied.

Respectfully submitted,

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